IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

MULTIMEDIA GAMES, INC.,

Plaintiff,

v.

UNITED STATES, ex rel., NATIONAL INDIAN GAMING COMMISSION AND NIGC CHAIRMAN, MONTE R. DEER,

Defendants.

No. 02-CV-296-P[J]

FILED

SEP - 9 2002

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ORDER

Now before the Court is the Motion to Dismiss filed by Defendant, Plaintiff's Response to said motion and Defendant's Reply. Defendant seeks relief pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, under Fed.R.Civ.P. 12(b)(6) for failure to state a cause of action.

BACKGROUND

The record reveals on April 15, 2002, Deputy General Counsel of the National Indian Gaming Commission ("NIGC") sent a letter to Clifton Lind, President and C.O.O. of Multimedia Games, Inc., on behalf of the NIGC. The letter was in response to a March 21, 2001 request by Plaintiff as to whether the MegaNanza series of games should be considered class II or class III games. The letter advised

> We have determined that MegaNanza and its variations are class III games under the Indian Gaming Regulatory Act ("IGRA"). Consequently the game may only be offered

63

> on Indian lands pursuant to a tribal-state compact.

Plaintiff asserts that the findings of the NIGC were based on proposed regulations which had not yet been enacted, and that the letter ignored the applicable case law.

Proposed regulation 502.9 identified "games similar to bingo" as including

> Pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo means games played with a finite deal, and established prizes, that are preprinted and use paper or other tangible medium, such as, break open or scratch off tickets.

See Proposed Regulations, Federal Register, Vol. 67, No. 56, March 22, 2002, at 13297. By contrast, the regulations which were enacted June 17, 2002, with an effective date of July 17, 2002, defines "other games similar to bingo"

> as any game played in the same location as bingo (as defined in 25 USC 2703(7)(A)(i)) constituting a variant on the game of bingo, provided that such game is not house banked and permits players to compete against each other for a common prize or prizes.

Federal Register, Vol. 67, No. 116, June 17, 2002 at 41172.

Plaintiff filed an action in the Northern District of Oklahoma on April 18, 2002. Plaintiff noted that Defendant had reached a determination that certain machines operated by Plaintiff were "class III" gaming machines, and that Defendant had additionally transmitted copies of the letter to all NIGC Region Chiefs for distribution to the Tribes. Plaintiff claimed that the immediate effect of the letter was a decrease in the value of Plaintiff's stock and the delay or halt of a planned stock offering.

The record reveals testimony by Plaintiff's C.O.O., Clifton Lind indicated that following receipt of the April 15, 2002 letter, at least one of the tribes which operated Plaintiff's machines at four separate locations prohibited the further use of the machines.

Mr. Lind further testified that this resulted in a monthly loss of approximately $2,750,000.00 to the company. In the complaint, Plaintiff asserted that Plaintiff was not permitted to otherwise appeal or challenge the findings of the NIGC, and therefore filed the action pursuant to the Administrative Procedures Act. 5 U.S.C. §702. Plaintiff filed an Amended Complaint on May 3, 2002.

On June 14, 2002, Defendants filed a Motion to Dismiss the action asserting this court lacks jurisdiction to consider Plaintiff's complaint.

On June 14, 2002, Tim Harper, Region Chief of Region V, sent a letter addressed to all "Oklahoma Indian Gaming Tribes," regarding the MegaNanza games. The letter states, in pertinent part,

> Please be advised the National Indian Gaming Commission (NIGC) has determined that MegaNanza and its variations are class III games under the Indian Gaming Regulatory Act. Accordingly, this game(s) may only be played pursuant to a tribal-state compact [25 U.S.C. §2710(d)(1)(C)].
>
> * * * *
>
> All tribes operating MegaNanza and its variations should cease the operation of these games immediately. Continued play of these games may subject your tribe to a Notice of Violation, Civil Fine and/or a Closure Order from the NIGC.

On June 17, 2002, the NIGC, sent a Notice of Violation ("NOV") to the Chickasaw Nation. The notice indicated that site visits on February 8, 2002, by NIGC field investigators indicated MegaNanza games were being played at the Chickasaw Nation site. The notice additionally refers to the April 15, 2002 advisory letter that MegaNanza games constitute a class III game under IGRA, and that a June 14, 2002 letter advised that operating such a game constituted class III gaming. According to the notice a subsequent visit to the Chickasaw Nation site on June 16, 2002, indicated that approximately 60 MegaNanza machines were still in operation. The notice advised the Chickasaw Nation was in violation of IGRA and NIGC regulations. The Chickasaw nation was advised to cease and

desist operation of the MegaNanza games within 24 hours of receipt of the NOV. The Chickasaw Nation was advised that continued operation of the machines could result in the assessment of a civil fine in an amount of $25,000 per day per violation. The Chickasaw Nation was informed that this NOV could be appealed within 30 days by submitting a Notice of Appeal to the NIGC.

Plaintiff noted the Creek Nation withdrew several of its games shortly after April 15, 2002, and the Citizen Band Pottawatomie Nation withdrew its games after receipt of the June 14, 2002 letter. Mr. Lind testified that eight tribes at fifteen locations have ceased the use of the machines with a resulting loss of approximately eight million per month to his company.

Plaintiff seeks a permanent injunction pursuant to 28 U.S.C. §2202 and 5 U.S.C. §702 prohibiting the NIGC from further interfering in any way with Plaintiff or the tribes' operation of the Count Down Bingo, Two Step Bingo or with the revenues derived from these games by Plaintiff or the tribes.

DISCUSSION

Preclusion of review is a question of statutory construction. In this regard, the Supreme Court held that:

> [w]hether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984); United States v. Fausto, 484 U.S. 439 (1988). Any presumption favoring judicial review is overcome when "the congressional intent to preclude judicial review is `fairly discernible in the statutory scheme." *Block, 467 U.S. at 351(quoting Association of Data Processing Serv. Org. v. Camp, 397 U.S. 150, 157 (1970)); Fausto, 484 U.S. at 452.* In both *Fausto* and *Block*, the Supreme Court determined that Congressional intent to preclude review could be discerned based on "inferences of intent drawn from the statutory

scheme as a whole." *Fausto, 484 U.S. at 452 (citing Block, 467 U.S. at 349).*

Review of Commission decisions is limited by IGRA to final decisions of the Commission issued under 25 U.S.C. §§2710, 2711, 2712 and 2713. Congress expressly addressed the reviewability of decisions of the Commission. Section 15 of the Act provides:

> Judicial Review
>
> Decisions by the Commission pursuant to Section 2710, 2711, 2712 and 2713 of this title shall be final agency decisions for the purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.

25 U.S.C. §2714. The instant case does not fall within one of the statutory categories which permits judicial review at this time.

Subject to the regulations the Commission was authorized to promulgate, the Chairman is permitted to levy fines for any violation of the Indian Gaming Regulation Act ("IGRA"), or any violation of any regulation prescribed by the Commission. 25 U.S.C. §2714(a)(1). The Chairman's decision are appealable to the Commission. The Commission is required to provide an opportunity for appeal and hearing for the fines levied. 25 U.S.C. §2714(a)(2). The Chairman has the power to issue temporary closure orders under a statutorily prescribed hearing process before the Commission. The Commission has promulgated a detailed process for the hearings and resolution of disputes stemming out of the Commission's enforcement decisions. 25 C.F.R §577. Congress reiterated that judicial review would only be of final decisions made by the Commission. 25 U.S.C. §2713(c).

The IGRA authorizes the Chairman of the NIGC to order temporary closure of an Indian gaming facility for violations of the Act. 25 U.S.C. §2713(b)(1). This section also provides for a hearing before the full Commission to determine whether the Chairman's order "should be made permanent or dissolved." 25 U.S.C. §2713(b)(2).

The IGRA specifically provides that only the action of the

Commission, on appeal from a temporary order issued by the Chairman, is a final agency action subject to review under the APA. 25 U.S.C. §2713(c); §2714. At the time the Complaint was filed in the instant case, the Chairman had issued no notice of violation that could be made final by the Commission after the completion of an administrative process. Therefore, under the express terms of the IGRA, there has been no final agency action entered in this matter, and this court is without jurisdiction under the Administrative Procedure Act ("APA"), or the IGRA to grant the requested injunction. 25 U.S.C. §2705(6)(a)(1); §2706(a)(5); and §2713(b)(1), (2) and (c).[1]

Plaintiff cannot evade the Congressional scheme for judicial review of the Commission and the statutory mechanism for addressing violations of IGRA, i.e., a notice of violation, and an administrative hearing followed by judicial review. The IGRA

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[1] A third enforcement measure which is available to the Chairman is a temporary closure order, which is placed on a fast track for review and which becomes a judicially reviewable final agency action in no more than sixty (60) days after the tribe appeals. 25 U.S.C. §2714(b). Only after the administrative process, including appeal and hearing, has been completed, did Congress allow judicial review. The doctrine of exhaustion of remedies is premised on the principle that "courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction." McKart v. United States, 395 U.S. 185, 194 (1969). Appeal procedures are contained in 25 C.F.R. §577. The Commission appoints a Presiding Official, sometimes an Administrative Law Judge, who must commence a hearing within thirty (30)days of the notice of appeal. 25 C.F.R. §577.4. An administrative record of the case up to that time is submitted to the Presiding Official. A hearing must be concluded within thirty (30) days of its commencement. Intervention of interested parties is permitted. 25 C.F.R. §577.4(b). An evidentiary transcribed hearing under oath is available to resolve issues of fact, with an opportunity to submit oral and documentary evidence, cross-examine witnesses, and present oral arguments. 25 C.F.R. §577.7. Thirty (30) days from the filing of a transcript, a recommended decision with findings of fact and conclusions of law is submitted to the NIGC. 25 C.F.R. §577.14. Thirty (30) days from that date the Commission must affirm or reverse, in whole or in part the recommended decision by a majority vote. 25 C.F.R. §577.15. It is this decision which Congress stated was appealable "to the appropriate Federal district court." 25 U.S.C. §2714.

specifically provides that only the action of the full Commission, after administrative appeal from a temporary order or fine issued by the Chairman, is a final agency action subject to review under the APA. 25 U.S.C. §2713(c); §2714. In the instant case, the Commission has not entered any order or made any decision. Therefore, under the express terms of IGRA, there has been no final agency action entered in this matter, and this court is without jurisdiction under the APA or IGRA to grant the requested relief. 25 U.S.C. §2705(6)(a)(1); §2706(a)(5); and §2713(b)(1), (2) and (c). Absent final agency action to review, there is no jurisdiction.

The court further finds Plaintiff has no standing to bring this suit under the IGRA. Plaintiff claims that as a manufacturer and vendor of MegaNanza games, it has been injured by the advisory opinions of Deputy General Counsel. Plaintiff also contends that its injuries fall within the zone of interest of the IGRA and should be protected.

The manufacturer has failed to establish the existence of a legally protected interest to satisfy the first element of standing. *See National Credit Union Administration v. First National Bank Trust Co., 522 U.S. 479, n.7 (1988)*. In order to demonstrate appealable status, Plaintiff must show the injury complained of falls within the zone of interest sought to be protected by the statutory provision whose violation forms the basis of the complaint. *Clark v. Securities Industries, 479 U.S. (1987)*.

The third party interests of a vendor seeking to sell gaming equipment are not within the zone of interests protected by the IGRA. Plaintiff, as a manufacturer and vendor of gaming devices, is no more than an incidental beneficiary under the statute. Therefore, under the IGRA, Plaintiff does not have a protected interest in this case. The incidental interests of the vendor/investor of gaming devices are too attenuated and tangential to fall within the judicially protected interests of the IGRA.

The IGRA, which is codified at 25 U.S.C. 2701-2721 and 18 U.S.C. 1166, "provides a comprehensive regulatory framework for

gaming activities on Indian lands" which "seeks to balance the interests of tribal governments, the states, and federal government." *Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1548 (10th Cir. 1997)*. The Act establishes the NIGC, and assigns it responsibility for regulating and monitoring certain forms of gaming permitted by the Act. See 25 U.S.C. §§2704, 2705, 2709-11.

Additionally, the case or controversy requirement of Article III of the Constitution requires, in every case, that the Plaintiff establish a concrete injury in fact that is causally connected to the defendant's alleged conduct and that would likely be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)*. The APA, which limits its right to judicial review to persons who are adversly affected or aggrieved within the meaning of the relevant statute imposes a further "prudential" standing requirement.5 U.S.C. §702. "For a plaintiff to have `prudential standing' under the APA, `the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question." *National Credit Union Admin. v. First National Bank & Trust Co., 522 U.S. 479, 487 (1998) (quoting Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970))*. "[T]he meaning of the zone-of-interests test is to be determined not by overall purpose of the Act in question . . . ., but by reference to the particular provision of law upon which plaintiff relies." *Bennett v. Spear, 520 U.S. at 175-76; see also, Lujan v. National Wildlife Fed'n, 497 U.S. 871, 883 (1990) ("The plaintiff must establish that the injury he complains of . . . falls within the `zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.")*

The determination of whether a game is Class II or III is critical to the protection of the balance of state and tribal interests. This is reflected in the IGRA which "grants states a qualified federal right to be free from class III tribal gaming activities within their borders in the absence of a compact regulating such activities." *Florida v. Seminole Tribe, 181 F.3d*

1237, 1247 (11th Cir. 1999). The IGRA carefully balances the state and tribal interests in engaging in Class III gaming by crafting a comprehensive scheme of remedies, but one which precludes a private cause of action to vindicate this zone of interest benefit.

The gaming vendor's interests in marketing a Class III game is not an interest addressed in the IGRA. Nothing in the statute addresses protecting the interests of equipment vendors. The commercial interests of a gambling device vendor is similar to the incidental interests of a pharmaceutical company wishing to market a drug before FDA approval, or seek reimbursement pursuant to Medicare. *See, Tap Pharmaceuticals v. U.S. Dept. Of Health and Human Services, 163 F.3d 199, 205 (4th Cir. 1998)*. "[A] party who is merely an incidental beneficiary cannot meet the test." Id. When causation and redressibility hinge upon the actions of third parties, the standard is much higher than in the normal case. *Lujan, 504 U.S. at 562*. Where a plaintiff is not directly affected by the challenged governmental action, "standing is not precluded, but it is ordinarily `substantially more difficult' to establish." Id. (citations omitted). That is particularly true where the elements of standing "depend on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict." Id. *(quoting ASARCO, Inc. v. Kadish, 490 U.S. 605, 615 (1989)*.

In the instant case, there is no tribe before the court.[2] It is only a tribe which could choose to embark upon gaming, even after a supplier adjudication of the issue, an adjudication not binding on the tribe or the United States as against a separate party. It would be the tribe that would receive a Notice of Violation, only if the Chairman of the Commission agreed with the advisory opinion written by the Deputy General Counsel of the NIGC. Further, a review in court would occur only if, after completing the administrative process with a hearing, the Commission made a

[2] A Motion for Intervention by Chickasaw Nation, Choctaw Nation of Oklahoma, and Cherokee Nation Enterprises, Inc., was filed June 18, 2002 and is currently pending before this court.

determination that the gaming equipment was in violation of IGRA. In such a case, this court would then have an administrative record to review.

The provisions of the statute distinguishing between class III and class II represent the statutory balance between the interests of the tribes, and states and federal government's interest in the enhanced regulatory protection provided by tribal-state compacts against criminal influence; it confers no protection to Plaintiff. *See, State of Florida v. Seminole Tribe, 181 F.3d 1237, 1247 (11th Cir. 1999); Cabazon Band of Mission Indians v. NIGC, 14 F.3d 633, 633-34 (D.C.Cir. 1994)*. The IGRA established a scheme for legalized Indian gambling that accommodated the tribal, federal, and state interests. It very specifically set up causes of action for district court jurisdiction related to the enforcement of the IGRA. Actions by a tribe, a state, or the Secretary were authorized. 25 U.S.C. §2710(7)(A). It specifically delineated the categories of decisions that were subject to judicial review. "As [the Supreme Court] stated in Transamerica Mortgage Advisors, ... it is an elemental cannon of construction that where a statute provides a particular remedy or remedies, a court must be wary of reading others into it." *44 U.S. at 19. See also, Touche Ross & Reddington, 442 U.S. 560, 571-4 (1979)*. "In the absence of a contrary Congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority v. Sea Clammers, 433 U.S. 1, 14-15.*[3]

This court currently lacks jurisdiction to declare that

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[3] The IGRA provides a detailed list of express remedies. See 25 U.S.C. §2710(d)(A)(ii)(authorizing state or tribal suit to enjoin class III gaming in violation of tribal-state compact); 25 U.S.C. §2710(d)(A)(iii)(authorizing the Secretary of the Interior to bring suit to enforce procedures regarding class III gaming); 25 U.S.C. §2710(d)authorizing a tribal suit to compel the Chairman of the NIGC to approve a management contract); 25 U.S.C. §2713(a)(2), (b)(2), (c) and 25 U.S.C. §2710(d)(7)(A)(i)(tribal lawsuit for a State's failure to negotiate in good faith regarding the formation of a tribal-state compact). See also, Florida v. Seminole Tribe of Florida, 181 F.3d at 1248.

issuance of penalty and closure orders and other NIGC enforcement activities are unlawful because IGRA precludes pre-enforcement review of enforcement matters. Therefore, the court finds this action does not fall under the limited waiver conferred in the Indian Gaming Regulatory Act (IGRA) for certain final decisions of the NIGC. Review of decisions of the NIGC under the APA are channeled through specific judicial review mechanisms provided in IGRA. This action does not fall within this limited review conferred by the IGRA. This action, instead, constitutes an impermissible attempt to secure review outside the Congressional scheme and secure pre-enforcement review not allowed under the statute. Further, there is no final agency action that is capable of being reviewed. Plaintiff likewise has no standing under IGRA as a vendor of gaming equipment.

Accordingly, the instant case is dismissed without prejudice.

IT IS SO ORDERED this 9th day of September, 2002.

JAMES H. PAYNE
UNITED STATES DISTRICT JUDGE